Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC *and* International Association of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL–CIO/CLC.

International Longshore and Warehouse Union *and* International Association of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL–CIO/CLC. Cases 32–CA–110280 and 32–CB–118735

May 2, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On December 1, 2016, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent Union filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent Union filed a reply. The Charging Party filed cross-exceptions and a supporting brief, and the Respondent Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt her recommended Order as modified and set forth in full below.[2]

In 1999, the Port of Oakland leased berths 20–24 to marine terminal operator A.P. Moller-Maersk (Maersk). At that time, the International Association of Machinists and Aerospace Workers, District Lodge 190, and East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL–CIO/CLC (Machinists) represented the employees performing marine terminal maintenance and repair work (M&R work) at those berths. Maersk contracted the M&R work to Pacific Marine Maintenance Company, LLC (PMMC), which recognized the Machinists and adopted the predecessor's collective-bargaining agreement with the Machinists. In 2005, Pacific Crane Maintenance Company, Inc. (PCMC) took over the M&R work at berths 20–24, hired the PMMC unit employees, but recognized the International Longshore and Warehouse Union (ILWU) as their representative and applied to those employees the coastwide multi-employer collective-bargaining agreement between the ILWU and the Pacific Maritime Association (PMA-ILWU Agreement). In *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB 1206 (2013), reaffirmed in 362 NLRB No. 120 (2015) (*PCMC*), the Board found, among other things, that PMMC and PCMC, a single employer, violated the Act by withdrawing recognition from the Machinists, recognizing the ILWU when the ILWU did not represent an uncoerced majority of unit employees, and applying the terms of the PMA-ILWU Agreement to the unit employees. The Board further found that the ILWU violated the Act by accepting such recognition and agreeing to apply the PMA-ILWU Agreement, including its union-security provisions, to the unit employees.

In January 2010, Respondent Ports America Outer Harbor, LLC (PAOH) took over the operation of berths 20–24 at the Port of Oakland and contracted the M&R work to PCMC's successor, Pacific Crane Maintenance Co., LP (PCMC II).[3] PCMC II continued to recognize

[1] The Respondent Union has excepted to some of the judge's credibility determinations. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We reject the Respondent Union's claim that it was denied due process because it did not receive timely notice of the scope of the unit alleged to be appropriate by the General Counsel—specifically, whether the General Counsel was alleging that the unit included crane mechanics. The unit found appropriate by the judge, a finding we have affirmed, is the same unit alleged in the complaint, and there is no dispute that crane mechanics are excluded from that unit. In these circumstances, we reject the Respondent Union's claim that anything in the manner in which the General Counsel litigated the case could have misled the Respondents into believing that the alleged unit included crane mechanics.

[2] In declining to recommend a broad cease-and-desist order against the Respondent Union, the judge relied on *Postal Service*, 354 NLRB 412 (2009). We agree with the judge that a broad order is unwarranted in this case, but we do not rely on her citation of *Postal Service*, which was decided by a two-member Board and thus in the absence of a quorum. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

We have amended the judge's conclusions of law and remedy and modified her recommended Order to conform to the violations found and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[3] PCMC II is a named respondent in the Board's decision in *PCMC* and a successor employer to PMMC and PCMC under both *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), and *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973). See *PCMC*, 359 NLRB at 1207 fn. 3.

the ILWU and to apply the PMA-ILWU Agreement to the unit employees. In October 2010, PAOH took over the operation of berths 25 and 26 at the Port of Oakland. The M&R work at those berths had been performed by Machinists-represented employees of marine terminal operator Transbay Container Terminal. PAOH extended its service contract with PCMC II to cover the M&R work at berths 20–26, and PCMC II included the former Machinists-represented employees of Transbay Container Terminal along with the existing unit employees in the ILWU unit. Finally, in July 2013,[4] having decided to take over the work itself, PAOH cancelled its contract with PCMC II and hired the employees that previously had worked for PCMC II at Berths 20–26. Despite the Machinists' bargaining demand, PAOH recognized the ILWU and applied the PMA-ILWU Agreement to the unit employees.

The main issue presented in this case is whether Respondent PAOH is a successor employer to PCMC II. If so, then, consistent with the Board's prior decision in *PCMC,* it violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Machinists and further violated Section 8(a)(2) and (1) by recognizing the ILWU as the representative of the unit employees and applying the PMA-ILWU Agreement, including its union-security clause, to those employees; and the ILWU violated Section 8(b)(1)(A) and (2) by accepting such recognition. The judge found that PAOH became a successor employer to PCMC II when it took over performance of the M&R work on July 1. For the reasons stated in the judge's decision as well as those discussed below, we agree.

An employer is a successor employer obligated to recognize and bargain with the union representing the predecessor's employees when (1) the successor acquires, and continues in substantially unchanged form, the business of a unionized predecessor (the "substantial continuity" requirement); (2) the successor hires, as a majority of its workforce at the acquired facility, union-represented former employees of the predecessor (the "workforce majority" requirement); and (3) the unit remains appropriate for collective bargaining under the successor's operations. Whether the "workforce majority" requirement has been met is determined as of the time the successor has hired a substantial and representative complement of employees. Finally, assuming all other requisites are established, the successor's duty to bargain attaches if the union has demanded recognition or bargaining, even if the union's demand was made *before* the other requirements for successorship had been met. See *Burns*, 406 U.S. at 280–281; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–54 (1987). We find that the judge correctly applied this test to the facts here.

To begin, we agree with the judge that the General Counsel established substantial continuity between PCMC II and PAOH. The record shows that after the M&R operation changed hands in July, the unit employees continued to perform the same jobs under generally the same working conditions and under most of the unit's former supervisors.[5] The ILWU failed to present any evidence showing that the day-to-day life of the unit employees was significantly different after PAOH took over the M&R operations. Thus, as the judge observed, former PCMC II employees hired by PAOH would "understandably view their job situations as essentially unaltered." *Fall River Dyeing*, 482 U.S. at 43 (internal quotation omitted); see also *A. J. Myers & Sons, Inc.*, 362 NLRB No. 51, slip op. at 7 (2015) (differences in equipment, location, and supervision did not defeat finding of continuity of operations); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063–1064 (2001) (finding substantial continuity, notwithstanding that new employer provided a different supervisor, different pay rates and benefits, and newer buses to drive, where employee bus drivers were performing the same work that they performed for the predecessor).

Moreover, on July 1, when PAOH hired a substantial and representative complement of employees, a majority of its employees performing bargaining-unit work were former PCMC II employees. Indeed, the record shows that as of July 1, all steady mechanics employed by PAOH previously worked for PCMC II at berths 20–26.[6]

[4] All dates hereafter are in 2013 unless stated otherwise.

[5] There is no dispute that PAOH M&R Director Gilbert Currier and M&R Manager Michael Loftesnes, along with M&R Supervisors Robert Walker and Brad Stolison, oversaw the work of the M&R departments and supervised the M&R mechanics for PCMC II and thereafter for PAOH. Although PAOH did not hire former PCMC II manager Joe Ray, the record suggests that Ray had an extremely limited supervisory role, as he just did paperwork and gave the M&R mechanics no direct instructions. Moreover, both Currier and Loftesnes testified that the work performed by the M&R mechanics did not change after PAOH's takeover. Employee Bobby Payne also testified that his job duties remained the same, notwithstanding a slight change in his work location (from berth 24 to berth 25). Lastly, in adopting the judge's finding that PAOH's employees' jobs and working conditions remained the same, we do not consider its predecessors' assignment of their employees to nonunit positions in the crane department and nonunit locations (berths 30 and 55–56), as such conduct was held unlawful in *PCMC*, 359 NLRB at 1211, and remained unremedied as of July 1.

[6] The ILWU does not specifically argue that PAOH did not employ a substantial and representative complement of employees as of July 1, and in any event we agree with the judge that it did. In these circumstances, we reject the ILWU's argument that PAOH's employment of additional non-crane mechanics *after* July 1 calls into question the judge's finding of majority status. Therefore, we find it unnecessary to

The ILWU argues, however, that the judge should have considered non-steady mechanics—temporary employees PAOH employed through the PMA-ILWU joint dispatch hall under the PMA-ILWU Agreement between July 1 and December 31. We reject this contention because PAOH's use of non-steady employees to supplement the bargaining unit was a product of the unlawful application of the PMA-ILWU Agreement to the unit. *PCMC*, above, 359 NLRB at 1211.[7]

Further, we agree with the judge that a unit consisting of employees performing the M&R work at berths 20–26 at the Port of Oakland remained an appropriate unit under PAOH's operations. As the judge found, non-crane mechanics continued to perform M&R container and equipment repair and were not interchanged with crane mechanics. Also, the record shows that non-crane mechanics worked at different locations than crane mechanics. In these circumstances, we find that non-crane mechanics remained a separate and distinct group under PAOH's operations. Cf. *Bronx Health Plan*, 326 NLRB 810, 812 (1998) (finding a unit appropriate under successor's operations where the alleged unit employees performed a distinct function from that traditionally performed by employees in the larger unit under the predecessor, they had been physically separated from the larger unit, and they had not been subject to interchange with the larger unit), enfd. 203 F.3d 51 (D.C. Cir. 1999).[8]

We also agree with the judge that there is no merit in the ILWU's claim that the alleged unit was no longer appropriate under PAOH's operations. Other than its accretion defense, which we reject as discussed below, the ILWU argues that PAOH was not required to recognize the Machinists as the representative of the alleged unit because the employees had been part of the ILWU coastwide bargaining unit for at least 8 years before PAOH's takeover. We reject this argument because the unit employees' representation by the ILWU and their inclusion in the ILWU-PMA coastwide unit was a direct result of the predecessor employers' unlawful assistance to and recognition of the ILWU. In making unit determinations, the Board gives no weight to bargaining history where the union involved has already been found to have been illegally assisted by the employer. See, e.g., *Pacific Telephone and Telegraph Co.*, 80 NLRB 107, 112 (1948).

In addition, the ILWU argues that the alleged unit did not remain appropriate because the "unit work at issue in the PCMC case" represented a tiny fraction of the M&R work in 2013. Specifically, the ILWU argues that PCMC's primary customer was Maersk, whereas Maersk containers comprised only a small percentage of the container volume at berths 20–26 after 2010. Again, we are unpersuaded by the ILWU's argument. The unit in this case is defined by the work performed (noncrane M&R work at berths 20–26), not by the customer for whom the work is performed. Moreover, a change in the identity of customers served will not defeat a successorship finding where, as here, the employees continue to perform the same work in the same location using the same equipment. See *Mondovi Foods Corp.*, 235 NLRB 1080, 1081–1082 (1978).[9]

For these reasons, we agree with the judge that as of July 1, PAOH was a successor employer to PCMC II. And because the Machinists had requested bargaining, we further agree that PAOH violated the Act by failing to recognize and bargain with the Machinists. PAOH further violated the Act by instead recognizing the ILWU as the representative of the unit employees and applying the PMA-ILWU Agreement, including its union-security provisions, to those employees, and Respondent ILWU violated the Act by accepting such recognition and agreeing to apply the PMA-ILWU Agreement to the unit employees.[10]

pass on the ILWU's argument that additional non-crane mechanics who started working for PAOH on July 13 previously worked for PCMC II at locations other than berths 20–26.

[7] We also note that the ILWU does not contend that former PCMC II employees did not constitute a majority of the unit employees on July 1 had the judge considered both steady and non-steady mechanics hired by PAOH.

[8] The judge, at one place, inadvertently misstated that the work of the unit employees included maintenance and repair of cranes. The judge's misstatement is a harmless error and does not affect our decision. As the judge's recommended Order correctly indicated, the bargaining-unit work is limited to non-crane M&R work. Also, in determining whether PAOH is a successor employer, we have not considered its crane department operations.

[9] The ILWU argues that the judge erroneously precluded its argument and evidence on the issue of the appropriateness of the alleged unit. However, each Respondent *did* dispute the appropriateness of the unit in its posthearing brief, and the judge considered and rejected those contentions. In addition, we will reverse a judge's evidentiary ruling only when the party urging such reversal demonstrates that the judge's ruling was not only erroneous, but also prejudicial to its substantive rights. *Monroe Mfg.*, 323 NLRB 24, 25 (1997). Assuming arguendo that the judge's ruling was erroneous, the ILWU has not shown that the evidence it seeks to admit would warrant reversal of the judge's finding on the issue of unit appropriateness. Specifically, the excluded evidence was offered to show that the unit was no longer appropriate because it had been accreted to the ILWU coastwide unit under the PMA-ILWU Agreement. The Board has held, however, that the application of the PMA-ILWU Agreement to PCMC/PCMC II's non-crane mechanics was an unlawful unilateral change, which therefore could not be relied on in determining whether the unit of non-crane mechanics retained its separate identity. See *PCMC*, 359 NLRB at 1211.

[10] We find no merit in the ILWU's exception to the judge's ruling rejecting evidence concerning the ILWU's alleged majority support among the unit of non-crane mechanics at berths 20–26 in the Port of Oakland. As the judge observed, the proffered evidence that the unit employees were members of the ILWU prior to PAOH's 2013 takeover

AMENDED CONCLUSIONS OF LAW

1. Insert the following as Conclusion of Law 1 and renumber the subsequent paragraphs accordingly:

"1. Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act."

2. Insert the following as Conclusion of Law 2 and renumber the subsequent paragraphs accordingly:

"2. Machinists District Lodge 190 and East Bay Automotive Machinists Lodge No. 1546, affiliated with the International Association of Machinists and Aerospace Workers, AFL–CIO/CLC (Machinists or IAM), and the International Longshore and Warehouse Union (ILWU or the Respondent Union) are labor organizations within the meaning of Section 2(5) of the Act."

3. Insert the following as Conclusion of Law 3 and renumber the subsequent paragraphs accordingly:

"3. The Machinists is, and at all material times has been, the exclusive collective-bargaining representative of employees in the following appropriate unit:

All employees employed at Berths 20 through 26 at the Port of Oakland, Oakland, California performing work described in and covered by 'Article 1, Section 2. Work Jurisdiction' of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the International Association of Machinists and Aerospace Workers, AFL–CIO and Pacific Marine Maintenance Co. LLC (the Machinists-PMMC Agreement); excluding all other employees, guards, and supervisors as defined in the Act."

AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist from engaging in such conduct and, as explained in the remedy section of the judge's decision, to take certain affirmative action designed to effectuate the policies of the Act. Among other remedies, the judge recommended an affirmative bargaining order to remedy the Respondent Employer's unlawful refusal to bargain with the Machinists.

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent Employer's unlawful refusal to recognize and bargain with the Machinists. The Board adheres to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.[11]

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738–739 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, above at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."

Although the Board has respectfully disagreed with the court's requirement for the reasons set forth in *Caterair*, above, we have examined the particular facts of this case and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees, who were denied the benefits of collective bargaining through their designated representative by the Respondent Employer's refusal to recognize and bargain collectively with the Machinists and its recognition of the ILWU, and by the ILWU's acceptance of that recognition. A bargaining order is particularly necessary to vindicate the

is irrelevant, given that predecessor employers had unlawfully applied the PMA-ILWU Agreement, including its union-security provisions, to non-crane mechanics in the Port of Oakland since 2005. See *PCMC*, 359 NLRB at 1211. Moreover, the Board's determination of "majority support" turns on whether a majority of unit employees wish to be represented by a particular union, not on whether a majority of them are members of that union. See *Trans-Lux Midwest Corp.*, 335 NLRB 230, 232 (2001), enfd. mem. 53 Fed. Appx. 571 (D.C. Cir. 2002). For the same reasons, we also find no merit to the ILWU's exceptions to the judge's ruling precluding evidence or argument concerning PAOH's alleged good-faith doubt of the Machinists' majority status premised on the employees' ILWU membership.

[11] Members Kaplan and Emanuel express no view as to whether *Caterair International* was correctly decided in this regard. However, they acknowledge that *Caterair* is extant Board precedent.

At a certain point, PAOH became known as Outer Harbor Terminal, LLC (OHT). In March 2016, PAOH/OHT ceased operations and filed Chapter 11 bankruptcy proceedings. However, the Board has issued an affirmative bargaining order even when a successor employer ceased its operations during the proceedings. See, e.g., *Dunmyre Motor Express, Inc.*, 275 NLRB 299, 300 (1985); *Emsing's Supermarket, Inc.*, 284 NLRB 302, 305 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989). The judge's recommended affirmative bargaining order, which we find warranted, will apply in the event PAOH/OHT resumes operations.

unit employees' Section 7 rights in this case because those employees were not only denied representation by the Machinists but also unlawfully required to join the ILWU as a condition of their employment. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Machinists' continuing majority status for a reasonable period of time, does not unduly prejudice the Section 7 rights of employees who may oppose continued representation by the Machinists. The duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. It is only by restoring the status quo ante and requiring the Respondent Employer to bargain with the Machinists for a reasonable period of time that the employees will be able to fairly assess the Machinists' effectiveness as a bargaining representative in an atmosphere free of the Respondent Employer's unlawful conduct. The employees can then determine whether continued representation by the Machinists is in their best interest.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the Respondent Employer's incentive to delay bargaining in the hope of further discouraging support for the Machinists. It also ensures that the Machinists will not be pressured to achieve immediate results at the bargaining table following the Board's issuance of a cease-and-desist order to forestall an effort by the ILWU to resume its representative status, perhaps with the Respondent Employer's support—or worse, its unlawful assistance.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent Employer's violations because it would permit another challenge to the Machinists' majority status before the taint of the Respondent Employer's unlawful refusal to bargain with the Machinists and its unlawful recognition of the Respondent Union has dissipated. Such a result would be particularly unjust in the circumstances presented here, where the Respondent Employer's unfair labor practices likely created a lasting negative impression of the Machinists among employees in the bargaining unit, the Respondent Employer has made clear its preference that its employees be represented by a different labor organization, and that the union (the ILWU) has enjoyed the fruits of its unlawful representation for many years. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued representation by the Machinists or by any other union. In order to provide employees with the opportunity to fairly assess for themselves the Machinists' effectiveness as a bargaining representative, the bargaining order requires the Respondent Employer to bargain with the Machinists for a reasonable period of time should it resume operations.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

ORDER

A. The Respondent Employer, Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain collectively, on request, with the Machinists District Lodge 190 and East Bay Automotive Machinists Lodge No. 1546, affiliated with the International Association of Machinists and Aerospace Workers, AFL–CIO/CLC (Machinists) as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit (the unit) concerning wages, hours, and other terms and conditions of employment:

> All employees employed at Berths 20 through 26 at the Port of Oakland, Oakland, California, performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the International Association of Machinists and Aerospace Workers, AFL–CIO and Pacific Marine Maintenance Co. LLC (the Machinists-PMMC Agreement); excluding all other employees, guards, and supervisors as defined in the Act.

(b) Granting assistance to International Longshore and Warehouse Union (ILWU or Respondent Union) and recognizing it as the exclusive collective-bargaining representative of the unit employees at a time when the ILWU did not represent an unassisted and uncoerced majority of the employees in the unit.

(c) Applying the terms and conditions of employment of the collective-bargaining agreement between the Respondent Employer and the ILWU (the PMA-ILWU Agreement), including its union-security provisions, to the unit employees at a time when the ILWU did not represent an unassisted and uncoerced majority of the employees in the unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from the ILWU as the exclusive collective-bargaining representative of the unit employees, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of those employees.

(b) Refrain from applying the terms and conditions of employment of a collective-bargaining agreement with the ILWU, including its union-security provisions, to the unit employees, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of those employees.

(c) Should the Respondent Employer resume operations, recognize and, on request, bargain with the Machinists as the exclusive collective-bargaining representative of the unit employees concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) Should the Respondent Employer resume operations, on request of the Machinists, rescind any departures from terms and conditions of employment that existed immediately prior to its predecessor's unlawful recognition of the ILWU.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being signed by the Respondent Employer's authorized representative, a copy of the attached notice marked "Appendix A"[12] to the last known addresses of all current and former unit employees employed by the Respondent Employer at any time since July 1, 2013.

(f) Promptly furnish the Regional Director with signed copies of the Respondent Employer's notice to employees marked "Appendix A" for posting by the Respondent Union at its facilities where notices to employees and members are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Employer has taken to comply.

B. The Respondent Union, International Longshore and Warehouse Union, Oakland, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting assistance and recognition from Respondent Employer Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC, as the exclusive collective-bargaining representative of the employees in the unit described below (the unit) at a time when the Respondent Union did not represent an uncoerced majority of the employees in the unit:

> All employees employed at Berths 20 through 26 at the Port of Oakland, Oakland, California, performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the International Association of Machinists and Aerospace Workers, AFL–CIO and Pacific Marine Maintenance Co. LLC (the Machinists-PMMC Agreement); excluding all other employees, guards, and supervisors as defined in the Act.

(b) Maintaining and enforcing the PMA-ILWU Agreement, or any extension, renewal, or modification thereof, including its union-security provisions, so as to cover the unit employees, unless and until the ILWU has been certified by the National Labor Relations Board as the representative of those employees.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Decline recognition as the exclusive collective-bargaining representative of the unit employees, unless and until the ILWU has been certified by the National Labor Relations Board as the exclusive representative of those employees.

(b) Reimburse all present and former unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its headquarters and at its offices and meeting halls in Oakland, California, copies of the attached notice marked "Appendix B."[13] Copies of the notice, on forms provided

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

by the Regional Director for Region 32, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent Union customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 14 days after service by the Region, post at the same places and under the same conditions as in the preceding subparagraph signed copies of the Respondent Employer's notice to employees marked "Appendix A."

(f) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

Dated, Washington, D.C. May 2, 2018

_____
Mark Gaston Pearce, Member

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain collectively, on request, with the Machinists District Lodge 190 and East Bay Automotive Machinists Lodge No. 1546, affiliated with the International Association of Machinists and Aerospace Workers, AFL–CIO/CLC (Machinists) as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit (the unit) concerning wages, hours, and other terms and conditions of employment:

> All employees employed at Berths 20 through 26 at the Port of Oakland, Oakland, California, performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the International Association of Machinists and Aerospace Workers, AFL–CIO and Pacific Marine Maintenance Co. LLC (the Machinists-PMMC Agreement); excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT grant assistance to International Longshore and Warehouse Union (the ILWU) or recognize it as the exclusive collective-bargaining representative of the unit employees at a time when the ILWU does not represent an unassisted and uncoerced majority of the employees in the unit.

WE WILL NOT apply the terms and conditions of employment of our collective-bargaining agreement with the ILWU (the PMA-ILWU Agreement), including its union-security provisions, to the unit employees at a time when the ILWU does not represent an unassisted and uncoerced majority of the employees in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL withdraw and withhold all recognition from the ILWU as the exclusive collective-bargaining representative of our employees in the unit described above, unless and until the ILWU has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL refrain from applying the terms and conditions of employment of a collective-bargaining agree-

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tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ment with the ILWU, including its union-security provisions, to the unit employees, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL, should we resume operations, recognize and, on the Machinists' request, bargain with the Machinists as the exclusive collective-bargaining representative of our employees in the unit described above concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, should we resume operations and on the Machinists' request, rescind any departures from terms and conditions of employment that existed immediately prior to our predecessor's unlawful recognition of the ILWU.

PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY KNOWN AS OUTER HARBOR TERMINAL, LLC

The Board's decision can be found at www.nlrb.gov/case/32-CA-110280 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT accept assistance or recognition from Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC (the Employer) as the exclusive collective-bargaining representative of the employees in the following appropriate unit (the unit) at a time when we do not represent an uncoerced majority of the employees in the unit:

> All employees employed at Berths 20 through 26 at the Port of Oakland, Oakland, California, performing work described in and covered by "Article 1, Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between the International Association of Machinists and Aerospace Workers, AFL–CIO and Pacific Marine Maintenance Co. LLC (the Machinists-PMMC Agreement); excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT maintain or enforce our collective-bargaining agreement with the Employer (the PMA-ILWU Agreement), or any extension, renewal, or modification thereof, including its union-security provisions, to the unit employees, unless and until we have been certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL decline recognition as the exclusive collective-bargaining representative of the employees in the above unit, unless and until we have been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL reimburse all present and former employees in the unit described above for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

The Board's decision can be found at www.nlrb.gov/case/32-CA-110280 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Amy Berbower, Esq., and *David Willhoite, Esq.,* for the General Counsel.

Mark Theodore, Esq., and *Scott A. Kruse, Esq.,* for Respondent Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC.

Robert Remar, Esq., Lindsay R. Nicholas, Esq., and *Eleanor Morton, Esq.,* for Respondent International Longshore and Warehouse Union.

David A. Rosenfeld, Esq., for International Association of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL–CIO/CLC.

David S. Durham, Esq., Todd C. Toral, Esq., and *Christopher M. Foster, Esq.,* for former Respondents MTC Holdings, Inc. and its affiliates and subsidiaries, including but not limited to Marine Terminals Corporation.

Todd Amadon, Esq., limited appearance, for Pacific Maritime Association.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. At issue in these consolidated cases is whether PAOH[1] succeeded to the obligation to bargain with IAM[2] when it took over performance of marine terminal maintenance and repair (M&R) work at berths 20 through 26 at the Port of Oakland[3] on July 1, 2013.[4] The General Counsel alleges that PAOH violated Section 8(a)(1), (2), and (5) by recognizing ILWU[5] and refusing to recognize IAM. Also at issue is whether ILWU violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition of the M&R employees.[6]

A. Employer Operations

The Port leases berths to marine terminal operators. The outer harbor of the Port contains berths 20–26. Berths 20–24 were leased to marine terminal operator A.P. Moller-Maersk (Maersk) in 1999. Marine terminal operator PAOH was awarded the lease of berths 20–24 and took over operation from Maersk on January 1, 2010. At that time, marine terminal operator Transbay Container Terminal (TBCT) leased berths 25 and 26. The customers of these marine terminal operators are ocean carriers or shipping lines who dock at the Port's berths to load and unload both containerized and non-containerized cargo. The marine terminal operators coordinate loading and unloading of the vessels, pickup and drop off of cargo by truck, and movement, storage, and monitoring of the cargo in the terminal yard. The M&R work at issue here involves maintaining and repairing not only the cargo moving equipment but also the containers and refrigeration equipment.

B. Collective Bargaining and Litigation Background

Due to lengthy ongoing litigation between the parties, the relevant facts, none of which are disputed, commence in 1999. In that year, Maersk took over operation of berths 20–24 at the Port. It awarded the M&R container work to Pacific Marine Maintenance Company, LLC (PMMC). PMMC adopted the prior contractor's single employer IAM collective-bargaining agreement and signed a successor agreement with IAM effective from April 1, 2002 until March 31, 2005. This PMMC/IAM contract applied to all mechanics and other IAM-represented employees at facilities and operations where PMMC did business and had commercial control including berths 20–24 at the Port. (Art. 1, Sec. 2.). The contract extended to "all accretions to the bargaining unit including, but not limited to, newly established or acquired shops, and the consolidation of shops in the [covered] geographical area." (Art. 1, Sec. 4.)

Pacific Crane Maintenance Co., Inc. (PCMC) took over the M&R work at berths 20–24 at the Port beginning on March 31, 2005. PCMC hired the previous PMMC IAM-represented M&R employees as ILWU-represented M&R employees. PCMC applied the multi-employer Pacific Maritime Association (PMA)-ILWU coast-wide contract. NLRB litigation ensued (the *PCMC* litigation) and in February 2009 an administrative law judge found no violation of the Act. Exceptions to the judge's decision were filed with the Board.

In January 2010, PAOH took over operation of berths 20–24 from Maersk. PAOH continued the services of PCMC to perform M&R work with its ILWU-represented employees. On October 1, 2010, berths 25 and 26 were added to the PAOH operations and 20 of the 23 IAM-represented employees who previously worked for TBCT at berths 25 and 26 were incorporated into the PCMC ILWU-represented work force. No new unfair labor practice charges were filed at this time.

On June 24, 2013, a three-member panel of the Board issued *PCMC I*[7] which reversed the administrative law judge and found that stipulated single employers PCMC and PMMC, and their stipulated successor employer Pacific Crane Maintenance Co. LP (all referred to as PCMC/PMMC) had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from IAM on March 31, 2005, and violated Section 8(a)(2) and (1) by recognizing ILWU and applying the terms of the PMA contract with ILWU to the employees performing the marine terminal M&R work at various locations including berths 20

[1] Ports America Outer Harbor, LLC, (PAOH), currently known as Outer Harbor Terminal, LLC (OHT).

[2] International Association of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL–CIO/CLC (IAM).

[3] The Port of Oakland (the Port) in Oakland, California.

[4] An amended consolidated complaint, issued on March 11, 2016, included an alternative theory that MTCH Holdings (MTCH) and its affiliates and subsidiaries, including but not limited to Marine Terminals Corporation (MTC), constituted a single employer with PAOH. The amended, consolidated complaint also alleged that PAOH, MTCH and MTC were on notice of PCMC's potential liability in the *PCMC* litigation. These allegations were settled in a partial non-Board settlement between IAM, PAOH/OHT, MTCH, and MTC.

[5] International Longshore and Warehouse Union (ILWU).

[6] There is no dispute and the record fully supports findings of jurisdiction and labor organization status. This case was heard over the course of 17 days in Oakland, California.

[7] *PCMC/Pacific Crane Maintenance Co.,* 359 NLRB 1206 (2013).

through 24 at the Port.[8] ILWU was found in violation of Section 8(b)(1)(A) and (2). One year later, pursuant to *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), *PCMC I* was set aside due to defective appointments of two of the three Board members who issued *PCMC I.*

On July 1, 2013, PAOH took over the M&R work from PCMC and continued the operations. PAOH did not have any M&R employees prior to that date. All employees hired by PAOH to perform the M&R work beginning July 1, 2013, had previously worked for PCMC. PAOH continued recognition of ILWU when it took over. The unfair labor practice charges underlying this current litigation were filed at this time.[9]

On June 17, 2015, the Board, having considered de novo the judge's decision, held,[10] inter alia, that PCMC/PMMC had violated Section 8(a)(1), (2), and (5) and ILWU had violated Section 8(b)(1)(A) and (2) when PCMC took over operations on March 31, 2005, and recognized ILWU rather than IAM.

In March 2016, PAOH, now known as OHT, ceased operations and filed Chapter XI bankruptcy proceedings.

C. Alleged Unfair Labor Practices

From March 31, 2005 until October 1, 2010, PCMC/PMMC continued to unlawfully recognize ILWU in violation of PCMC II

The General Counsel avers that from March 31, 2005 until October 1, 2010, Maersk subcontractor PCMC/PMMC continued to violate the Act, as found in *PCMC II,* by failing to recognize IAM and instead recognizing ILWU for employees performing M&R work at berths 20–24. The General Counsel also claims that ILWU continued to violate the Act as found in *PCMC II* by accepting recognition throughout this period. During this period, on January 1, 2010, PAOH took over from Maersk as the contracting employer at the Port. However, PCMC continued their subcontracting duties as before—now for PAOH rather than Maersk. There is no dispute regarding these facts. Thus it is found that from March 31, 2005 until October 1, 2010, PCMC/PMMC continued to refuse to recognize IAM and, instead, recognized ILWU for employees performing covered M&R work at berths 20–24.

Unlawful Recognition of ILWU Continued Following Acquisition of Berths 25 and 26 on October 1, 2010 in an appropriate expanded bargaining unit of M&R employees

On October 1, 2010, PAOH expanded its operations beyond berths 20–24 when it acquired the rights to operate adjacent berths 25 and 26 from TBCT. TBCT ceased doing business at that time. PAOH demolished the fence that separated berths 20–24 from berths 25 and 26 and operated the expanded area as a consolidated terminal operation. Twenty of the former 23 M&R IAM-represented employees of TBCT were hired by PCMC. PAOH purchased all of TBCT's equipment and took over TBCT's clients. PAOH subcontracted performance of marine terminal M&R work at Berths 25 and 26 to PCMC. The TBCT M&R employees were incorporated into the unit and worked alongside the PCMC M&R employees.

The General Counsel alleges that TBCT IAM-represented M&R employees at Berths 25 and 26 performed unit work and were thus, as a matter of law, included in the unit or, alternatively, were accreted into the PCMC unit of ILWU-represented M&R employees at Berths 20–24. The General Counsel alleges that this work expanded the appropriate collective-bargaining unit to include "all employees employed at Berths 20 through 26" (the expanded unit).

In agreement with the General Counsel, it is found that the expanded unit is an appropriate unit for purposes of collective-bargaining within the meaning of Section 9(b) of the Act. The bargaining unit found appropriate in *PCMC II,* at 1212–1213, was a single employer Oakland and Tacoma[11] M&R unit described as

> All employees employed in Tacoma, Washington and Oakland, California, including at Berths 20 through 24 at the Port of Oakland, Oakland, California, performing work described in and covered by "Article 1.Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between [IAM and PMMC]; excluding all other employees guards and supervisors as defined in the Act.

The October 1, 2010 takeover of berths 25 and 26 added 20 additional M&R employees to the operations. These employees formerly worked for TBCT and were represented by IAM. There is no dispute that when they were hired by PCMC, these employees were required to be represented by ILWU. Further, there is no dispute that the prior TBCT employees had the same duties and interests as the PCMC M&R employees they joined. The TBCT employees were integrated functionally. They had common supervision. Their skills and functions were identical. They worked in the same areas with constant contact. Their working conditions and benefits were identical. Thus, the General Counsel contends an appropriate "expanded" unit came into being through inclusion of former TBCT employees. That unit is described as follows:

> All employees employed in Tacoma, Washington and Oakland, California including at Berths 20 through 26 at the Port of Oakland, Oakland, California, performing work described

[8] In August 2007, with notice of PCMC's potential unfair labor practice liability, Pacific Crane Maintenance Co., LP (PCMC LP) purchased the business and assets of PCMC and continued to operate the business in essentially the same form. The Board held in *PCMC II* that PCMC LP was jointly liable for the unfair labor practices of PCMC/PMMC pursuant to the parties' stipulation that PCMC LP was a successor employer pursuant to *NLRB v. Burns Security Services,* 406 U.S, 272 (1972), and *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973).

[9] IAM filed the charge and amended charge in Case 32–CA–110280 on July 30 and September 19, 2013, respectively. IAM filed the charge in Case 32–CB–118735 on December 6, 2013. The complaint mistakenly lists these dates as in 2014. The complaint is hereby corrected.

[10] *PCMC/Pacific Crane Maintenance Co.,* 362 NLRB No. 120 (2015) (*PCMC II)*, reviewed de novo the vacated decision in *PCMC I*, and agreed with the rationale set forth in the vacated decision. The factual and legal holdings in *PCMC II* are binding as to the current dispute. The Board's holding in *PCMC II* is on review in the District of Columbia Circuit Court of Appeals.

[11] PAOH did not take over the PCMC work in Tacoma.

> in and covered by "Article 1.Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between [IAM and PMMC]; excluding all other employees guards and supervisors as defined in the Act.

At the time of litigation in *PCMC,* the Oakland work encompassed only berths 20–24. The General Counsel contends that the single-employer expanded unit, including berths 20–26, is appropriate for purposes of collective bargaining because the former TBCT employees were hired into the historical bargaining unit. The General Counsel relies on cases which hold that when a collective-bargaining agreement defines the bargaining unit in terms of the type of work performed, any new or transferred employees who perform that work are automatically included in the bargaining unit.[12] Thus, under this theory, once a determination is made that the new or transferred employees perform unit work and properly belong to the unit, no accretion analysis is necessary.

In *Tarmac America*, the Board eschewed application of an accretion analysis when one forklift operator was hired at a nearby newly created distribution facility. Rather, the Board determined that the classification was included in the unit description and the union's geographic jurisdiction. Similarly, in *Gourmet Award Foods*, when the employer refused to apply the terms of its collective-bargaining agreement covering drivers and warehousemen to temporary, jointly-employed warehousemen, the Board held, 336 NLRB at 873–874:

> It is axiomatic that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit. This inclusion is mandated by the Board's certification of the unit or by the parties' agreement regarding the unit's composition. In the present case, the jointly employed employees are new hires employed by the Respondent and placed in positions that are within the plain meaning of the contractual unit description (drivers and warehousemen). The broad and unequivocal language of the contract compelling the inclusion of newly hired warehousemen employed solely by the Respondent equally requires the inclusion of the temporary warehousemen at issue in this proceeding.

The "new or transferred employees" analysis has been utilized not only in refusal to bargain cases but also in unit clarification contexts. See, e.g., *Premcor, Inc.*, 353 NLRB 1365, 1366 (2001) (unit clarification appropriate to resolve ambiguity regarding unit placement of individual in newly created classification); cf., *AT Wall Co.*, 361 NLRB 695 (2014) (finding accretion analysis applicable to acquisition of new operations). The 2002–2005 IAM contract defined "work jurisdiction" as including, but not limited to:

> Maintenance, Body and Fender work, Painting, Rebuilding, Dismantling, Assembling, Repairing, Installing, Erecting, Welding and Burning (or grinding processes connected therewith), Inspecting, Diagnosing, Cleansing, Preparing or Conditioning of all units and auxiliaries (including refrigeration and air conditioning (units) relating to . . . trucks, trailers, cargo containers, generator sets, refrigeration units, dollies, forklifts, shovels, trench digging and excavating equipment) and all work historically being performed under this contract.

At the time TBCT ceased business, its M&R employees worked pursuant to an IAM collective-bargaining agreement with TBCT effective April 24, 2008 through June 30, 2013. The work jurisdiction of that agreement covered

> [A]ll employees engaged in the maintenance, rebuilding, dismantling, assembling, repairing, installing, cleansing, preparing and conditioning of . . . containers, skeletal frame chassis, refrigeration equipment, trailers, truck tanks, trailer tanks or bodies . . . ."

Utilizing the "new or transferred employees" analysis, it is easily concluded that the 20 former TBCT M&R employees who were hired by PCMC performed the bargaining unit work described in the work jurisdiction description of the 2002–2005 IAM contract.

Moreover, the same conclusion is reached if an accretion analysis is applied. In *N V Energy, Inc.*, 362 NLRB No. 5, slip op. at 3–4 (2015), the Board summarized its accretion policies as follows:

> When the Board finds an accretion, it adds employees to an existing bargaining unit without conducting a representation election. The purpose of the accretion doctrine is to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir. 1985), quoted in *Frontier Telephone of Rochester,* supra at 1271. However, because accreted employees are added to the existing unit without an election or other demonstration of majority support, the accretion doctrine's goal of promoting industrial stability is in tension with employees' Section 7 right to freely choose a bargaining representative. *Frontier Telephone of Rochester,* supra at 1271. The Board accordingly follows a restrictive policy in applying the accretion doctrine. See *CHS, Inc.,* 355 NLRB 914, 916 (2010) (quoting *Archer Daniels Midland Co.,* 333 NLRB 673, 675 (2001)); *Super Valu Stores,* 283 NLRB 134, 136 (1987). Under the well-established accretion standard set forth in *Safeway Stores, Inc.,* 256 NLRB 918, 918 (1981), the Board finds "a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." Id. (footnotes omitted). See also *Frontier Telephone of Rochester,* supra at 1271; *E. I. Du Pont,* supra at 608 (quoting *Ready Mix USA, Inc.,* 340 NLRB 946, 954 (2003)). In determining whether this standard has been met, the Board considers factors including integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions,

[12] The General Counsel cites *Tarmac America, Inc.*, 342 NLRB 1049, 1050 fn. 5 (2004); *Gourmet Award Foods*, 336 NLRB 872, 873 (2001).

> skills and functions, common control of labor relations, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange. *Archer Daniels Midland,* supra at 675 (citing *Progressive Service Die Co.,* 323 NLRB 183 (1997)).[9] However, the Board has held that the "two most important factors—indeed, the two factors that have been identified as critical to an accretion finding—are employee interchange and common day-to-day supervision," and therefore "the absence of these two factors will ordinarily defeat a claim of lawful accretion." *Frontier Telephone of Rochester,* supra at 1271 and fn. 7 (internal quotations and footnote omitted).

In October 2010, TBCT ceased doing business at berths 25 and 26 and PAOH took over the TBCT lease of berths 25 and 26. PAOH purchased TBCT's equipment through an equipment purchase agreement. PAOH added berths 25 and 26 to its operation. These berths were adjacent to PAOH berths 20–24, separated by a fence. The fence was torn down and maintenance and repair work at the combined berth 20–26 area was integrated. The former TBCT employees no longer had a separate identity.

At the time of its closure in October 2010, TBCT employed 23 M&R employees represented by IAM. PCMC ultimately hired 20 of the 23 TBCT M&R employees. The three who were not hired chose to retire. Some of the M&R employees from TBCT were placed in the repair shop at berth 24. Chassis repair work was moved from the shop at berths 22 and 23 to a vacant mechanic shop at berth 25.

The TBCT M&R employees were IAM-represented but were hired by PCMC as ILWU-represented employees. Pursuant to its subcontract, PCMC continued supervision of the M&R work but now expanded that supervision to berths 25 and 26. On being transferred to PCMC, the employees continued to perform the same duties. However, because the fence between berths 20–24 and berths 25–26 was torn down, the former TBCT employees worked side-by-side with PCMC employees at M&R shops at berths 20–26 and were integrated into the operations. The nature of their work remained the same. They used the same equipment or type of equipment. All supervisors, whether formerly with TBCT or PCMC, reported to centralized PCMC management. Centralized PAOH administrative control was exercised. Upon the takeover, PCMC applied the ILWU contract to the former TBCT IAM-represented M&R employees.

Thus, the TBCT employees were accreted into the PCMC work force. The employees worked in the integrated operations side-by-side with PCMC M&R employees under the same supervision and working conditions. Their skills and functions were identical to the PCMC M&R employees. Management, labor relations, and administrative control were centralized. Thus, whether utilizing the "new or transferred employee" analysis or the accretion analysis, the TBCT employees were combined into an appropriate expanded unit.

From October 1, 2010 through June 30, 2013, PCMC continued to unlawfully recognize ILWU in the expanded unit of employees.

The General Counsel further alleges that during the period from October 1, 2010 until June 30, 2013, IAM continued as the exclusive collective-bargaining representative of the expanded unit. No new unfair labor practice charge was filed during this period of time. However, contemporaneous with the TBCT cessation of business, IAM requested bargaining with PAOH on August 3, 2010. An August 18, 2010 IAM grievance alleged refusal to bargain with IAM. From October 1, 2010 through June 30, 2013, PCMC continued as the PAOH M&R subcontractor at berths 20–26.

From July 1, 2013 through March 2016,[13] PAOH unlawfully recognized ILWU in the expanded bargaining unit of employees.

Effective July 1, 2013, PAOH ceased utilizing PCMC as a subcontractor and took over performance of the marine terminal M&R work at berths 20 through 26 at the Port. All M&R employees hired by PAOH were hired from PCMC. These employees continued to perform substantially the same work under the same supervision at the same location. The operations of the M&R department were continued in substantially unchanged form.

As the Board explained in *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 5 (2016):

> The Board's successorship doctrine is "founded on the premise that, where a bargaining representative has been selected by employees, a continuing obligation to deal with that representative is not subject to defeasance solely on grounds that ownership of the employing entity has changed." *Hudson River Aggregates, Inc.,* 246 NLRB 192, 197 (1979), enfd. 639 F.2d 865 (2d Cir. 1981), citing [*NLRB v. Burns Security Services,* 406 U.S, 272, 279 (1972)]. Consistent with this view, a new employer that continues its predecessor's business in substantially unchanged form and hires employees of the predecessor as a majority of its work force is a successor with an obligation to bargain with the union that represented those employees when they were employed by the predecessor. *Burns*, 406 U.S. at 280–281; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

In determining whether there is substantial continuity of the predecessor's operations, the Court, in *Fall River Dyeing,* supra, 482 U.S. at 41–43, found the following criteria instructive:

- [W]hether the business of both employers is essentially the same;
- [W]hether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and
- [W]hether the new entity has the same production process, produces the same products and has basically the same body of customers.

These factors are viewed from the perspective of the employees. That is, whether the employees who were hired by the successor would view their jobs as "essentially unaltered."

[13] On or about March 31, 2016, PAOH, using the name OHT, ceased doing business, sold its equipment, and is currently in Chapter XI bankruptcy proceedings. All parties agree that PAOH/OHT no longer maintains a presence at the Port or anywhere else.

Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973); see also, *Tree-Free Fiber Co., LLC*, 328 NLRB 389, 390 (1999) (employees did the same work in substantially the same way and "from their viewpoint," the operation and their role in the operation was unchanged from that of the predecessor.)

As mentioned before, there is no dispute that one hundred percent of the initial PAOH M&R steady[14] workforce were previously employees of PCMC. No one disputes, and the Board found in *PCMC II,* that the historical unit is an appropriate bargaining unit. As found above, the expanded bargaining unit is also an appropriate bargaining unit. Thus, it remains only to determine whether the PAOH unit of employees was appropriate, whether the business of PAOH and PCMC were essentially the same, whether employees of PAOH were doing the same job in the same working conditions under the same supervisors, and whether PAOH had the same production process, the same services, and basically the same body of customers. All of these remaining questions are answered in the affirmative.

PAOH did not take over PCMC's M&R work in Tacoma. The only difference between the expanded unit and the PAOH unit is that M&R work at Tacoma is not included. Thus, the PAOH unit included only Oakland berths 20–26. No party argues that this variance defeats the appropriateness of the unit. Moreover, as the General Counsel notes, a finding of successorship is not defeated by the mere fact that only a portion of a unit is taken over. *Bronx Health Plan*, 326 NLRB 810, 811–812 (1998), enfd 203 F.3d 51 (D.C. Cir. 1999).

The businesses and production processes of PAOH and PCMC, as they related to M&R work, were essentially identical.[15] That is, both of them serviced containers, refrigeration systems, and loading and unloading equipment. The equipment used to load and unload either refrigerated or non-refrigerated containers includes cranes, top picks, side picks, RTGs, forklifts, yard goats, bombcarts, and pickup trucks.[16] The work of the unit employees involves maintenance and repair of the containers as well as maintenance and repair of cranes, generators, chassis, pickups and loading and unloading equipment. There is no evidence that the nature of this work has changed from 2005 to the present. There is no dispute that the operation of M&R work as performed by PCMC and PAOH at these berths was similar if not identical.

When PAOH took over from PCMC on July 1, 2013, all of its M&R employees were former PCMC employees in the expanded unit. At a special meeting of the PMA Labor Relations Committee (LRC) on June 21, 2013, PAOH stated that it "planned to keep the same complement of men by departments at Berths 20–26." Seniority lists provided by PAOH indicated 52 PCMC mechanics would be "hired steady" by PAOH as of Monday, July 1, 2013, and another 16 PCMC mechanics would be "hired steady" by PAOH effective Saturday, July 13, 2013.

On July 1, 2013, PAOH began operating the M&R work itself. On that date, approximately 48–52 former PCMC mechanics began working for PAOH.[17] . On July 13, 2013, 16 more former PCMC mechanics[18] joined PAOH with a seniority date of July 1, 2013. All of these mechanics continued to perform the same job duties that they performed for PCMC.[19] No other employees were immediately hired. Thus, all of PAOH's employees were former employees of PCMC in the expanded unit.

Further, the employees were doing the same job in the same working conditions under the same supervisors both before and after July 2013. They continued to perform M&R container and equipment repair and are not interchanged with ILWU crane repair mechanics. Thus, beginning in July 2013, John Luis Costa became employed by PAOH as a mechanic at the shop on berth 24 at the Port. Costa began working at berth 24 in November 2004. At that time his employer was PMMC and he was represented by IAM. He performed maintenance and repair on container handling equipment such as top picks, side picks forklifts, RTGs, yard goats, bombcarts, and pickup trucks. Costa worked in the same building while employed by PMMC, PCMC, and PAOH. While he was employed by PCMC, he continued working in the same building on the same equipment using the same tools. His coveralls were changed from orange to white. His assignments expanded to include maintenance and repair of refrigerated containers (reefers), generators (gensets), and port side cranes. When working for PCMC, he was represented by the ILWU. When PAOH took over, his coveralls were changed from white to orange and new tools were purchased by PAOH. These tools were the same type of tools used by PMMC and PCMC. PAOH also provided a new fleet of yard goats with catalytic converters to filter the diesel engine fumes. The M&R employees performed regular maintenance such as oil changes, valve adjustments, and similar jobs on all of the equipment.

Bobby Payne worked at berth 24 for PAOH as a day shift mechanic. He performed container and chassis repairs and reefer container repairs. He started working at the Port in 1990. From 2005 to 2013, he worked for PCMC. Then PAOH took

[14] ILWU argues that the workforce was fluid due to dispatches of temporary employees. There is no showing that these dispatched employees were part of the workforce at the time PAOH hired its permanent representative complement of employees on July 1, 2013.

[15] ILWU's argument that the business of PAOH, a marine terminal operator, and PCMC, an M&R subcontractor, ignores the requirement that these matters be viewed from the perspective of employees. It is the M&R work of these two entities that determines whether there is substantial continuity of the business.

[16] Top picks are machines that can lift and move a loaded container and can stack these containers five containers high. Top picks are also used for loading and unloading bombcarts or chassis. A bombcart is a large trailer that is used on the port only and is not taken on the highway. It can handle heavy loads for transport from one part of the yard to another part. A yard goat is a vehicle similar to a semi-tractor but it is used only in the yard. Chassis and bombcarts can be hitched to a yard goat for transport around the port. An RTG is a crane capable of lifting containers six high. It has rubber tires and is not on a rail. A side pick is a machine that handles empty containers.

[17] Comparison of the LRC seniority list of 52 PCMC mechanics who were eligible for hire on July 1, 2013, with a list prepared of all mechanics on or after January 16, 2014, indicates 48 of the 52 on the LRC list worked for PAOH at the time the list was prepared for the NLRB.

[18] Comparison of the LRC list of 16 PCMC mechanics who were to be hired on July 13, 2013, with the PAOH list prepared for the NLRB indicates that all of those mechanics were employed in January 2014.

[19] Two additional mechanics who had not worked for PCMC were hired on November 11, 2013.

over. There was no break in his employment. Payne performed the same work for PAOH that he performed for PCMC. His job location was shifted from berth 24 to berths 25 and 26. Joe Ray was his company manager with PCMC. A different manager, Chris [last name unknown] was company manager for PAOH and later was replaced by Dennis [last name unknown]. Payne described the manager's job as paperwork. No direct instructions were given to him by these managers. His leadman, Jose Robles, has remained the same through PCMC and PAOH. Payne testified that new tools were brought in by PAOH but they are the same type tools provided by PCMC.

As of July 1, 2013, Michael Loftesnes became the manager of the mechanic's shop at berths 22 and 23, where the power equipment, chassis, reefer, and container M&R employees worked. He reported to Gil Currier who was manager of the M&R department both before for PCMC and after for PAOH. The former PCMC mechanics were directly supervised by prior PCMC supervisors Robert Walker and Brad Stolison, both hired by PAOH. According to Loftesnes, the work of the M&R employees did not change when they ceased being employed by PCMC and became employed by PAOH.

From this evidence, it is concluded the businesses of PCMC and PAOH were basically the same and that PAOH used the same M&R process as PCMC, provided the same services as PCMC, and basically had a similar body of customers as PCMC.[20] Former PCMC employees became employees of PAOH performing the same job in the same working conditions under the same supervisors. New equipment similar to the PCMC equipment was utilized.[21] One hundred percent of PAOH's M&R employees were former PCMC M&R employees. There was no hiatus in their employment. Thus there can be little doubt that PAOH is a *Burns* successor to the *PCMC* obligation to bargain with IAM in an expanded, appropriate unit of employees.

PAOH's and ILWU's arguments that PAOH is not a Burns successor because the single-employer unit has lost its identity are rejected.

PAOH and ILWU claim PAOH is not a *Burns* successor because the bargaining unit that existed in 2005 is no longer an appropriate unit.[22] Specifically, PAOH and ILWU contend that the original historic unit has effectively merged into the PMA-ILWU multi-employer, coast-wide unit and lost its separate identity. This argument cannot avail and is rejected as it is built on unremedied unfair labor practices found in *PCMC II.* Although PCMC was ordered in *PCMC II* to cease and desist from recognizing ILWU, it has not done so and PAOH, as a *Burns* successor, has continued to recognize ILWU. PAOH may not rely on its predecessor's unlawful recognition of ILWU to render the historic IAM single-employer unit inappropriate.

The Board previously rejected PAOH's similar argument. In its order denying PCMC/PMMC's motion to reopen the record and for reconsideration of *PCMC II,* the Board denied the request to reconsider the appropriateness of its bargaining order due to passage of 10 years' time since it unlawfully withdrew recognition from IAM. The Board found that the affirmative bargaining order was appropriate despite a significant passage of time. (Unpublished order, slip op. at 3, March 1, 2016, 32–CA–021925, et al.). Further, the Board denied PCMC's request to reopen the record to show that former IAM-represented employees had been integrated into the ILWU's coastwise bargaining unit. Specifically, the Board held that such unlawful, unilateral changes would not be considered "in determining whether the former PMMC unit lost its separate identity." (Slip op. at 4–5).[23]

PAOH's argument that it is not a successor because it had a good-faith doubt of IAM's continuing majority status is rejected.

Additionally, PAOH claims that it is not a *Burns* successor because it had a good-faith doubt of IAM's continuing majority support. This argument is without merit. PAOH's argument is based on the "objective" evidence that its employees were all members of ILWU. This argument overlooks the unremedied unfair labor practices upon which ILWU membership is based. It is rejected for that reason.

PAOH's argument that IAM was guilty of laches in not filing a charge in 2009 is rejected.

PAOH asserts that since 2009 IAM was aware of PAOH's presence at the Port. PAOH argues that because IAM waited years (until 2013) to file a charge, IAM is guilty of laches. PAOH notes prejudice from IAM's failure to file a charge during the period beginning 2009. Thus, PAOH explains that it made the decision not to renew the PCMC contract without knowing that IAM believed it had a claim to the M&R work. Further, PAOH complains that the 10(b) period expired "many times over."

It is true that Section 10(b) of the Act provides, in relevant

[20] Customers of PCMC generally utilized Maersk containers. Maersk generator equipment remained after PAOH took over. Customers of PAOH included Hamburg Sud and Mediterranean. There were small differences in their containers. All of these customers were container shipping companies. See, *Mondovi Foods Corp.,* 235 NLRB 1080, 1082 (1978), cited by the General Counsel (changes in market can be indicative of a different type of business but must be extreme before it will alter a finding of successor).

[21] In *Harter Tomato Products Co.,* 321 NLRB 901, 902 (1996), enfd 133 F.3d 934 (D.C. Cir. 1998), the Board held that ownership of the same assets is not a prerequisite to a finding of successor.

[22] PAOH and ILWU cite *Trident Seafoods, Inc. v. NLRB,* 101 F.3d 111, 119 (D.C. Cir. 1996). PAOH also cites *Dattco, Inc.,* 338 NLRB 49, at 49 (2002); and *P. S. Elliott Services,* 300 NLRB 1161 (1990). ILWU also cites *Indianapolis Mack Sales & Serv.,* 288 NLRB 1123, 1127. None of these cases involve an initial, historical bargaining unit that was abrogated by unfair labor practices. Rather, they involve passage in time and lawful changes in operations. Thus, the rationale of these cases is inapplicable here.

[23] The Board cited *Naperville Jeep/Dodge,* 357 NLRB 2252, 2253 (2012) ("In determining whether an established bargaining unit retains its distinct identity, we do not consider the effects of the Respondent's unlawful, unilateral changes to the existing unit employees' terms and conditions of employment, as giving weight to such changes would reward the employer for its unlawful conduct."), enfd. 796 F.3d 31, 40 (D.C. Cir. 2015), cert denied, 136 S.Ct. 1457 (2016); *Comar, Inc.,* 349 NLRB 342, 357–358 (2007) (same); *Holly Farms Corp.,* 311 NLRB 273, 279 (1993) (same), enfd. 48 F.3d 1360 (4th Cir. 1995).

part, that "no complaint may issue based on any unfair labor practice occurring more than six months prior to the filing of the charge." Thus, in general, an unfair labor practice charge filed more than 6 months after the alleged unfair labor practice took place is considered untimely. This policy bars litigation over "past events after records have been destroyed, witnesses have gone elsewhere, and recollections . . . have become dim and confused."[24] Another important policy underlying adherence to the 6-month limitation period is the stabilization of labor relations.[25]

The 6-month limitation period prescribed by Section 10(b) begins to run only when a party has clear and unequivocal notice, either actual or constructive, of the violation of the Act. *University Moving & Storage Co.,* 350 NLRB 6, 7 (2007). The burden of showing clear and unequivocal notice is on the party raising the 10(b) defense. *Broadway Volkswagen,* 342 NLRB 1244, 1246 (2004). Where a delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by that party, a 10(b) defense will not be sustained. *A & L Underground*, 302 NLRB 467, 469 (1991).

The operative triggering event in this litigation was transfer of the M&R work from PCMC to PAOH. That happened on July 1, 2013 and the unfair labor practice charges underlying this proceeding were filed within the 6-month limitation period. The initial charge against PAOH was filed on July 30, 2013. The charge against ILWU was filed on December 6, 2013.

Implicit in PAOH's 10(b) and laches arguments is an assumption that the triggering event occurred in 2009. At that time, PAOH asserts, IAM had knowledge of PAOH's existence and its continued use of ILWU mechanics to perform the M&R work. This assertion is not accurate. It may be the IAM knew that PCMC was continuing to use ILWU-represented employees. However, PAOH was not the employer of M&R employees at that time. PCMC was. Nothing had changed since 2005 when the *PCMC* litigation arose except that Maersk had been replaced by PAOH. From the employee viewpoint, PCMC was the M&R employer from 2005 through 2013. Accordingly, the 10(b) argument is without merit. Further, even had there been a triggering event in 2009 or 2010, the Board is not a "court of equity" and does not recognize equitable defenses such as unclean hands, laches, and estoppel. *Goodyear Tire & Rubber Co*., 271 NLRB 343, 346 fn. 10 (1984) (citing *Teamsters Local 294 (Island Dock Lumber),* 145 NLRB 484, 492 (1963), enfd. 342 F.2d 18 (2d Cir. 1965): equitable doctrines do not apply against charging parties because NLRB proceedings are not for the vindication of private rights but are brought in the public interest to effectuate statutory policy).

CONCLUSIONS OF LAW

1. By failing and refusing to recognize and bargain with IAM as the exclusive collective-bargaining representative of PAOH in an appropriate unit of M&R employees at berths 20 through 26 of the Port, Respondent PAOH/OHT has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act and Section 2(6) and (7) of the Act.

2. By recognizing ILWU as the exclusive collective-bargaining representative of the PAOH unit of M&R employees at berths 20 through 26 of the Port even though the ILWU never represented an unassisted and uncoerced majority of the PCMC/PMMC M&R employees and applying the terms of the PMA-ILWU Agreement, including its union-security provisions, to its PAOH unit of M&R employees, Respondent PAOH/OHT has rendered unlawful assistance and support to ILWU in violation of Section 8(a)(2) and (1) of the Act.

3. By accepting assistance and recognition from PAOH/OHT as the exclusive collective-bargaining representative of the PAOH unit of M&R employees at berths 20 through 26 of the Port and agreeing to application of the PMA-ILWU Agreement to those employees, including union-security provisions, even though it never represented an uncoerced majority of the employees in the unit, Respondent ILWU violated Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, they shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Pursuant to the informal settlement agreement between IAM, PAOH/OHT, and MTCH/MTC, employees have been made whole for any loss of earnings they may have suffered due to PAOH's refusal to recognize and bargain with IAM and PAOH's recognition of ILWU and application of the PMA-ILWU Agreement. Moreover, the complaint, as amended following approval of the settlement, no longer alleges that PAOH/OHT is a *Golden State* successor to PCMC/PMMC. Thus, the issue of lost earnings is not present for remedy as to PAOH/OHT.

Nevertheless, pursuant to the partial non-Board settlement agreement, PAOH/OHT, having ceased doing business, has agreed to mail a notice to employees. Accordingly, PAOH/OHT shall mail the attached notice marked "Appendix A," at its own expense, to all current employees and former employees employed by PAOH/OHT at any time since July 1, 2013. Similarly, ILWU must post the attached notice marked "Appendix B" at its headquarters and offices and meeting halls in Oakland, California.

Although PAOH/OHT is no longer in business at the Port, in the event that it returns, it shall, on request, bargain with IAM regarding wages, hours, benefits, and other terms and conditions of employment, and if an agreement is reached, sign a written contract. Further, should PAOH/OHT resume operations at the Port, it must rescind any departures from the terms and conditions which existed prior to its predecessor's unlawful recognition of ILWU.[26] An affirmative bargaining order is appropriate to vindicate the Section 7 rights of employees who

[24] H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40.

[25] *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB,* 362 U.S. 411, 419 (1960).

[26] Noting that a lease for berths 24–26 at the Port was recently signed, IAM seeks a broader order containing language that any POAH/OHT successor should be required to recognize IAM. The standard language of all Board orders includes language applicable to an employer's "officers, agents, successors, and assigns."

were denied representation by IAM and required to join ILWU as a condition of continued employment.

In a typical situation in which recognition was unlawfully extended and accepted, the employer and union would be ordered jointly and severally to reimburse all present and former unit employees who joined the union for any initiation fees, periodic dues, assessments, or any other moneys they may have paid or that may have been withheld from their pay pursuant to the PMA-ILWU Agreement, together with compound interest. See, e.g., *ISS Facility Services, Inc.,* 363 NLRB No. 27, slip op. at 2 (2015). However, in this case, PAOH/OHT, MTCH/MTC, and IAM have settled any potential dues liability owed by PAOH/OHT to employees.

The release set out in the partial non-Board settlement includes any claims for "back pay, benefits, dues money or other financial obligation whatsoever as a result to the continuation of the litigation Case 32–CA–110280." Because of the release in the partial non-Board settlement between PAOH/OHT and IAM, the remedy for dues liability on the part of Respondent PAOH/OHT is no longer at issue in this proceeding.

Accordingly, Respondent ILWU is ordered to reimburse all present and former unit employees who joined the ILWU for any initiation fees, periodic dues, assessments, or any other moneys they may have paid or that may have been withheld from their pay pursuant to the PMA-ILWU Agreement since July 1, 2013, together with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

IAM argues that ILWU must be held liable to the IAM pension and health and welfare funds for lost contributions, citing *Teamsters Local 70 (Emery Worldwide),* 295 NLRB 1123, 1123–1124 (1989) (union ordered to make employer whole for any expenditures it incurred in contributing to the union's health and welfare plan that it would not have incurred under the contracted-for plan repudiated by the union); *Graphic Communications Workers Local 280,* 235 NLRB 1084, 1085 (1978) (union that unlawfully induced employer to abandon multi-employer bargaining required to make whole employer for any financial expenditures made pursuant to unlawful labor agreement which it would not have been obligated to make under the multiemployer contract), enfd. 596 F.2d 904 (9th Cir. 1975). These cases are distinguishable as they involved Section 8(b)(3) bad-faith bargaining rather than Section 8(b)(1)(A) and (2) unlawful recognition. The remedies in these cases flowed from the specific violations found. Thus, the IAM's request for this remedy is denied. IAM further argues that ILWU should be ordered to make whole employees for lost overtime, vacation pay, pension, and severance pay. This request is not supported by any authority and it is also rejected.

As to union dues, IAM requests that ILWU reimburse IAM for its lost dues from these employees who had signed dues check-off authorizations.[27] Such request would appear to require double payment of dues by ILWU, first to employees (as ordered above) and again to IAM. This request is rejected as punitive.

IAM requests that a finding be made regarding whether PAOH was a "perfectly clear"[28] successor to PCMC/PMMC in order to ensure restoration of the former conditions existing under the IAM contract and for purposes of future violations by successors to PAOH and the ILWU in like or similar situations. This invitation is declined as the issue of "perfectly clear" successor is not now nor has it ever been at issue in this proceeding.

Finally, IAM requests a broad order noting that ILWU was previously found to have unlawfully accepted recognition.[29] A broad order is not limited to "any like or related" misconduct. Rather, a broad order applies to any type of misconduct. A broad order also extends the scope of coverage to include employees of all employers. Thus, a board order goes beyond the relief that is typically granted. In *Hickmott Foods*, 242 NLRB 1357 (1979), the Board held

> [A broad] order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, each case will be analyzed to determine the nature and extent of the violations committed by a respondent so that the Board may tailor an appropriate order. [Footnote omitted.]

Thus, "repeat offenders and egregious violators" are subject to broad orders. When considering the imposition of a broad order under *Hickmott,* "the totality of circumstances" must be examined to determine whether behavior manifests "an attitude of opposition to the objectives of the Act." *Five Star Mfg.*, 348 NLRB 1301 (2006). IAM seeks an order that ILWU cease acceptance of recognition on a coast-wide, multi-employer basis.

Under the totality of the circumstances, a broad order would appear to be unwarranted. ILWU does not qualify as a repeat offender. One of the cited findings was in 1978. The other, in 2008. This does not constitute a clear pattern or practice of unlawful conduct. See, e.g., *Postal Service*, 354 NLRB 412 (2009). As there is no showing of proclivity to violate the Act, the request for a broad order is denied because there is no showing of proclivity to violate the Act. See, e.g., *Electrical Workers Local 98 (Tri-M Group, LLC)*, 350 NLRB 1104 (2007); *Iron Workers*, 307 NLRB 843 (1992). As to egregiousness, ILWU accepted recognition of PCMC's M&R workers in 2005 and continued this recognition after the ALJ decision in 2009 and through the Board's decision of 2015. The case is still in litigation before the District of Columbia Court of Appeals. ILWU repeated this behavior in 2013 when it accepted recogni-

[27] IAM further argues that ILWU should make PAOH whole because PAOH was forced to comply with an unlawful agreement. This request far exceeds the scope of this hearing. No allegation is present in this case that PAOH was forced to comply with an unlawful agreement.

[28] See *Burns,* supra, 406 U.S. at 294–295, recognizing that a successor may set initial substantive terms of employment except when it is "perfectly clear" that the successor plans to retain all of the unit employees. Thus, a "perfectly clear" successor cannot set initial terms where it states that it will retain all employees unless it is clear that employment is conditioned on acceptance of new terms. *Nexeo Solutions,* 364 NLRB No. 44, slip op. at 6–7 (2016).

[29] IAM cites not only *PCMC* but also *Retail Clerks Local 588*, 227 NLRB 670 (1976), enfd 587 F.2d 984 (9th Cir. 1978).

tion from PAOH. Although ILWU's defenses have been rejected before the Board in *PCMC II* and in this pending litigation, the issues are complex and ILWU's actions do not qualify as "egregious or widespread misconduct" which demonstrates general disregard for fundamental statutory rights. Moreover, a narrow order would encompass further behavior of this type. Thus, a broad order is also denied on the basis of lack of egregiousness.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

A. The Respondent PAOH/OHT, Oakland, California, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with IAM as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit (the expanded unit):

> All employees employed at Berths 20 through 26 at the Port of Oakland, Oakland, California performing work described in and covered by "Article 1.Section 2. Work Jurisdiction" of the April 1, 2002 through March 31, 2005 collective-bargaining agreement between [IAM and PMMC]; excluding all other employees guards and supervisors as defined in the Act.

(b) Granting assistance to ILWU and recognizing ILWU as the exclusive collective-bargaining representative of the PAOH unit of M&R employees at berths 20 through 26 of the Port at a time when the ILWU never represented an unassisted and uncoerced majority of the PCMC/PMMC M&R employees and maintaining and enforcing the terms of the PMA-ILWU Agreement, including its union-security provisions, to its PAOH unit of M&R employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from the ILWU as the exclusive collective-bargaining representative of the unit employees unless and until the ILWU has been certified as the exclusive representative of those employees.

(b) Refrain from applying the terms and conditions of employment of the PMA-ILWU contract, including its union-security provisions, to the unit employees, unless and until the ILWU has been certified as the exclusive representatives of those employees.

(c) Although PAOH/OHT is no longer in business at the Port, in the event that it returns, it shall recognize and on request bargain with the IAM as the exclusive collective-bargaining representative of the employees in the expanded unit regarding wages, hours, and other terms and conditions of employment. Further, should PAOH/OHT resume operations at the Port, it must rescind any departures from the terms and conditions which existed prior to its predecessor's unlawful recognition of ILWU.

(d) Because Respondent has ceased doing business, it is not ordered to post the attached notice marked "Appendix A."[31] However, because Respondent has gone out of business and/or closed the facility involved in these proceedings, Respondent shall duplicate and mail within 14 days, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2013.[32]

(e) Furnish the Regional Director with signed copies of its notice to employees marked as "Appendix A" for posting by the ILWU at its facilities where notices to employees and members is customarily posted. Copies of the notice to be furnished to the Regional Director shall be signed and returned to the Regional Director promptly.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that PAOH/OHT has taken to comply.

B. The Respondent ILWU, its officers, agents, and representatives shall

1. Cease and desist from:

(a) Accepting assistance and recognition from Respondent PAOH/OHT as the exclusive collective-bargaining representative of the PAOH expanded unit of M&R employees at berths 20 through 26 of the Port at a time when it did not represent an uncoerced majority of the employees in the unit and when the IAM was the exclusive collective-bargaining representative of the employees in that unit.

(b) Maintaining and enforcing the PMA-ILWU Agreement, or any extension, renewal, or modification thereof, including its union-security provisions, so as to cover the employees in the expanded unit unless and until it has been certified by the Board as the collective-bargaining representative of those employees.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Decline recognition as the exclusive collective-bargaining representative of the unit employees, unless and until ILWU has been certified as the exclusive representative of those employees.

(b) Reimburse all present and former expanded unit employees for all initiation fees, dues, and other moneys paid to them

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[32] IAM's request that a copy of the decision be enclosed with mailing of the Notice is rejected. The Board notice sufficiently advises employees that their Sec. 7 rights will be vindicated.

or withheld from their wages pursuant to the PMA-ILWU Agreement with interest.

(c) Preserve and within 14 days after service by the Region, post at its headquarters and at its offices and meeting halls in Oakland, California, copies of the attached notice marked "Appendix B."[33] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the ILWU's authorized representative, shall be posted by the ILWU for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means. Reasonable steps shall be taken by the ILWU to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 14 days after service by the Region, post at the same places and under the same conditions as in the preceding subparagraph signed copies of the PAOH/OHT notice to employees marked "Appendix A."

(e) Within 21 days after service by the Region, file with the Region Director for Region 32 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the ILWU has taken to comply.

Dated, Washington, D.C. December 1, 2016

APPENDIX A

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law by withdrawing recognition from the Machinists and recognizing ILWU instead and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Because we have been found to be the successor employer of single employer Pacific Crane Maintenance Co., Inc. (PCMC) and Pacific Marine Maintenance Co., LLC (PMMC) and their successor Pacific Crane Maintenance Co., LP, WE WILL NOT refuse to recognize and bargain in good faith with International Association of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL–CIO/CLC (Machinists) as your exclusive collective-bargaining representative in the following appropriate bargaining unit:

> All employees employed at Berths 20 through 26 at the Port of Oakland, Oakland, California performing work described in and covered by "Article 1. Section 2. Work Jurisdiction" of the Machinists-PMMC Agreement; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT grant assistance to or recognize International Longshore and Warehouse Union (ILWU) as the exclusive collective-bargaining representative of the above unit of employees because ILWU never represented an unassisted and uncoerced majority of the employees of the PCMC unit employees and WE WILL NOT apply the terms of the Pacific Longshore Contract Documents to you unless and until ILWU is certified as your exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights listed above.

WE WILL withdraw and withhold all recognition from ILWU as the exclusive collective-bargaining representative of our employees in the unit above unless and until ILWU has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL recognize and, on request, bargain with the Machinists as the exclusive collective-bargaining representative of our employees in the unit described above concerning wages, hours, and other terms and conditions of employment.

PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY KNOWN AS OUTER HARBOR TERMINAL, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-110280 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law by accepting recognition from PAOH/OHT and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT accept assistance and recognition from Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC as the exclusive collective-bargaining representative of the unit of employees below and WE WILL NOT agree to application of the PMA-ILWU Agreement to those employees, including the union-security provisions, even though we did not represent an uncoerced majority of the employees. The unit is

> All employees employed at Berths 20 through 26 at the Port of Oakland, Oakland, California performing work described in and covered by "Article 1. Section 2. Work Jurisdiction" of the Machinists-PMMC Agreement; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT maintain or enforce our collective-bargaining agreement with PAOH/OHT or any modifications, renewals, or extensions to that agreement, including its union-security provisions, so as to cover the unit employees, unless and until we have been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL DECLINE recognition as the exclusive collective-bargaining represent of the unit described above unless and until we have been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

WE WILL reimburse all present and former employees in the unit described above for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-110280 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.